Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT SANFORD DIETRICH,

Respondent,

v.

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Dietrich, an inmate imprisoned under a state court judgment, who filed his federal habeas petition too late, sought equitable tolling based on the claim that his state post-conviction attorney failed to keep him informed about the progress of his state post-conviction appeal, despite Dietrich's efforts to contact the attorney. Although it was unclear to what extent, if any, post-conviction counsel's failure to communicate had hindered Dietrich's efforts to seek relief, the Ninth Circuit decided that he was entitled to an evidentiary hearing on his equitable tolling claim. The court also accepted that the failure of Dietrich's post-conviction counsel to keep him informed about the status of his appeal could amount to an extraordinary circumstance warranting equitable tolling. The court proceeded on the assumption that equitable tolling can apply in this AEDPA (Anti-Terrorism and Effective Death Penalty Act) context.

The questions presented in this case are:

1. Is equitable tolling available to permit the filing of an otherwise untimely petition seeking relief in federal habeas corpus or do the provisions of 28 U.S.C. § 2244(d) fully define and circumscribe the circumstances in which the AEDPA one-year statute of limitations can be tolled or extended?

2. If equitable tolling is available, can attorney negligence, including a failure to communicate with a client, amount to an extraordinary circumstance that warrants equitable tolling of the AEDPA statute of limitations?

3. If equitable tolling is available, is a habeas petitioner entitled to an evidentiary hearing on such a claim where a court cannot tell from his submissions whether there is any causal relationship between his attorney's alleged failure to communicate about the status of a state-court case and the habeas petitioner's failure to file a timely petition? Has the Ninth

Circuit set the standard too low for obtaining an evidentiary hearing on equitable tolling, and is it applying inconsistent analyses to such claims?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Superintendent of the Oregon State Penitentiary, respectfully prays that the Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum decision of the Ninth Circuit is not reported. *Dietrich v. Czerniak* (Ninth Circuit No. 04-36063). The decision is in the appendix. (Pet. App. 11). The magistrate judge's findings and recommendation, the district court's order adopting the findings and recommendation, and the district court's judgment dismissing this habeas corpus proceeding also are in the appendix. (Pet. App. 1, 8, 10).

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit's memorandum decision was filed on September 28, 2006. This Court granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including January 26, 2007. This petition is being filed within the time granted by this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This is a habeas corpus proceeding brought by respondent Dietrich, a prisoner in state custody, pursuant to 28 U.S.C. § 2254. The state and federal court proceedings in respondent's case are summarized below.

1. State trial and direct appeal

After being indicted in state court on charges of first degree sodomy, first degree sexual abuse, using a child in a dis-

play of sexually explicit conduct, first degree rape, first degree unlawful sexual penetration, and endangering the welfare of a minor, respondent pleaded guilty to two counts of first degree sodomy, one count of first degree rape, and one count of first degree unlawful sexual penetration. (E.R. 14).[1] "[P]ursuant to [respondent's] negotiations with the State," the remaining counts were dismissed. (E.R. 15). In an amended judgment dated June 16, 1994, the trial court imposed consecutive sentences on the sodomy and rape convictions (with a concurrent sentence on the unlawful sexual penetration charge) for a total sentence of 265 months. (E.R. 14-15).

Respondent appealed, contending that the trial court had erred in imposing consecutive sentences, in recomputing his criminal history score under the state's sentencing guidelines based on the immediately preceding conviction (for example, in recomputing the criminal history score on count 2 based on the conviction on count 1), and in failing to apply the so-called "200 percent" rule to cap the consecutive sentences. (E.R. 23). On July 21, 1995, the Oregon Court of Appeals affirmed without opinion. (E.R. 62). Respondent filed a petition for review with the Oregon Supreme Court, which denied the petition. (E.R. 55, 64). The appellate judgment issued on November 29, 1995. (E.R. 65).

2. State post-conviction and appeal

On January 29, 1997, respondent filed a *pro se* petition for state post-conviction relief. (E.R. 66). He raised claims of ineffective assistance of his trial counsel, alleging that he would not have pleaded guilty if he had understood how long his total sentence could be, if he had known that his sentences could be consecutive, and if he had understood that the crimi-

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[1] E.R. refers to the excerpt of record filed with the Ninth Circuit Court of Appeals.

nal history score could be recomputed based on the immediately preceding convictions. (E.R. 68-69). Later, counsel was appointed to represent respondent. (E.R. 74). The post-conviction trial court ruled against respondent's claims and denied him relief. (E.R. 128, 132).

Respondent appealed, and his attorney filed an appellant's brief on October 21, 1998. (E.R. 97). On December 9, 1998, the State filed a motion for summary affirmance in the Oregon Court of Appeals, contending that respondent's "brief on appeal does not present a substantial issue of law." (E.R. 139). On January 22, 1999, the Court of Appeals granted the State's motion. (E.R. 141). Under state law, respondent had 35 days within which to seek review in the Oregon Supreme Court. Or. R. App. Proc. 9.05(2)(a). When no petition for review was filed, the appellate court judgment issued on April 8, 1999. (E.R. 142).

On May 17, 2000, respondent filed a *pro se* "motion for leave to file late petition for review and for substitute counsel" in the Oregon Supreme Court. (E.R. 143). Respondent claimed that the motion was "necessary because [he] was not apprised by his [post-conviction] appellate attorney that a decision had been rendered by the Court of Appeals nor of the necessity to file a Petition for Review within the 35 day limit." (E.R. 143). In his motion, respondent also alleged that he

> is unskilled in the law and is completely dependent upon his attorney to advise him as to his legal rights. During the course of this [post-conviction] appeal, [respondent] received only a single letter from counsel. This letter, dated March 5, 1999, but not received by [respondent] until late May of 1999, was a response to a February 3, 1999 letter from [respondent] inquiring about the status of his appeal. In this

> letter, Counsel advised [respondent] that he had enclosed a copy of the Appellant's Brief filed on [respondent's] behalf, but that there had been no word on when the [state's] Respondent's Brief would be filed. Counsel further advised [respondent] that, if he had any questions, he could write or call.
>
> After receiving this letter, [respondent] attempted to write twice to further inquire into the status of his appeal. [Respondent] also attempted to call at least three times, but no call was ever accepted by Counsel's office. When [respondent] could not reach Counsel by mail or phone, he asked his mother to call in order to obtain the status of his appeal. [Respondent's] mother could only make contact with Counsel's answering machine, whereby she left messages but no calls were ever returned.
>
> [Respondent] has recently discovered that his case was disposed of by Summary Affirmance in favor of the [State]. However, to date, [respondent] has not received a copy of the Motion for Summary Affirmance nor a copy of Counsel's response. Nor, has [respondent] received a copy of the Appellate judgment that was entered on 04/08/1999. [Respondent] was only able to discover this information after obtaining a court docket sheet.

(E.R. 143-44). Respondent complained that his attorney had not kept him "apprised as to the status of [the] case and his obligations therein so that [respondent] could exercise his legal rights." (E.R. 144).

On July 12, 2000, the Oregon Supreme Court granted respondent's motion, appointed an attorney to represent him, and set a due date for the filing of a petition for review. (E.R. 147). Counsel later filed a petition for review on respondent's behalf, and that petition was denied on February 6, 2001. (E.R. 174).

3. Federal habeas corpus

a. District court

On April 10, 2001, respondent filed a *pro se* petition seeking relief in habeas corpus. (E.R. 1). Counsel was later appointed to represent him, and counsel filed an amended petition on June 21, 2002. (E.R. 8, 189). The amended petition raised claims of ineffective assistance of respondent's trial counsel that were related to the entry of respondent's guilty pleas and claims of trial court error that also related to the entry of those pleas. (E.R. 9-10). The State sought dismissal of the petition on the ground that it was not timely filed and, alternatively, based on the fact that the state courts' decisions are entitled to due deference. (E.R. 177).

In his findings and recommendation, the magistrate judge recommended that the petition should be denied and the action should be dismissed. (E.R. 181). The magistrate judge noted that the appellate judgment on respondent's direct appeal in state court had become final on November 29, 1995, "prior to the effective date of AEDPA [the Anti-Terrorism and Effective Death Penalty Act]." (E.R. 177). "As such, the one year statute of limitations provided for [in the AEDPA] did not start running until April 24, 1996, the date the statute went into effect." (E.R. 177).

> [Respondent's] PCR [post-conviction relief] filing occurred on or about January 29, 1997, approximately 280 days after the clock started to run. His PCR proceedings tolled the statute

> until April 8, 1999, when the appellate judgment became effective. On that date, the clock started to run again.
>
> Over a year after the appellate judgment became final, [respondent] sought, and was granted, permission to file an untimely petition for Oregon Supreme Court review of the denial of his PCR petition. At that point, the clock would clearly stop again.

(E.R. 177-78) (footnote omitted).

After first determining that respondent was not entitled to statutory tolling during the period between the issuance of the appellate judgment on post-conviction and the Oregon Supreme Court's order allowing respondent to file a "late" petition for review in that proceeding, the magistrate judge turned to the issue of equitable tolling.[2] (E.R. 179). The magistrate judge rejected the equitable tolling claim as well. (E.R. 179-80). Respondent

> point[ed] to the lack of assistance from his post-conviction attorney as the circumstance that prevented his timely filing, alleging that the attorney failed to notify him when the Oregon Court of Appeals granted summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to in-

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[2] The correctness of the statutory-tolling ruling is not before this Court. The Ninth Circuit also ruled that respondent is not entitled to statutory tolling during the time period that elapsed between the issuance of the appellate judgment on post-conviction and respondent's motion for leave to file an untimely petition for review. (Pet. App. 13-14).

> form him of the issuance of the appellate judgment. However, these allegations fall squarely within the parameters of ordinary attorney negligence that the Ninth Circuit has routinely held to be inadequate grounds for equitable tolling. *See, e.g., Frye v. Hickman,* 273 F.3d 1144, 1146 (9th Cir. 2001); *Ford v. Hubbard*, 330 F.3d 1086, 1106 (9th Cir. 2002); *see also* [*Miranda v.*] *Castro*, 292 F.3d [1063,] at 1067 n. 4 [(9th Cir. 2002)] (collecting cases); *cf. Spitsyn v. Moore*, 354 F.3d 796 (9th Cir. 2003) (holding that a complete failure to file his client's habeas petition and the retention of the client's file beyond the limitations period, despite numerous requests by the client, could be "sufficiently egregious" to warrant tolling).
>
> Because petitioner has not alleged facts which would warrant equitable tolling, and because his habeas petition was filed after the expiration of the AEDPA statute of limitations for such filings, the petition should be denied.

(E.R. 180).

On de novo review, the district court judge agreed with the magistrate judge's findings and recommendation. The district court denied the petition and dismissed the case. (E.R. 183, 184).[3]

b. Ninth Circuit

On appeal, the Ninth Circuit reversed and remanded to the district court "for an evidentiary hearing related to equitable

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[3] The court later issued a certificate of appealability. (E.R. 186).

tolling and for other proceedings not inconsistent with this decision." (Pet. App. 16). As noted, the court rejected respondent's statutory tolling claim. (Pet. App. 13-14). But the court determined that respondent was entitled to an evidentiary hearing on his claim of equitable tolling. Although the court recognized that "[t]he mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling," the court also had acknowledged in the past that an attorney's misconduct could be sufficiently egregious to "'constitute an "extraordinary circumstance" warranting equitable tolling of AEDPA's statute of limitations.'" (Pet. App. 14, quoting *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003)) (additional citation omitted).

The district court had failed to "note the alleged attempts by [respondent] and his mother to reach the post-conviction counsel to inquire about [respondent's] case status." (Pet. App. 15). It was "thus unclear to what extent, if any, post-conviction counsel's lack of communication with or non-responsiveness to [respondent] and his mother hindered [respondent] from proceeding with his state application." (Pet. App. 15) (citation omitted). "Because [the court] consider[ed] there to be an insufficient development of the record, [the court could] not determine whether [respondent] faced extraordinary circumstances sufficient to justify equitable tolling." (Pet. App. 15). The court "conclude[d] that a remand is appropriate for an evidentiary hearing[.]" (Pet. App. 15). In the evidentiary hearing, the district court

> should determine the circumstances in which [respondent] attempted to inquire about the status of his case and obtain his file and any impact these circumstances, once determined by the district court, may have had on [respondent's] ability to advance his interests in seeking a timely discretionary review by the Su-

preme Court of Oregon of his post-conviction claims for relief.

(Pet. App. 15-16).

REASONS FOR GRANTING THE WRIT

In this case, where respondent claims he is entitled to equitable tolling because, despite his attempts to contact his attorney, his state post-conviction counsel did not keep him informed about the progress of his post-conviction appeal, the Ninth Circuit held that respondent's allegations are sufficient to entitle him to an evidentiary hearing on equitable tolling. At the heart of this case are the issues of whether equitable tolling is available at all in the AEDPA content and, if it is, whether allegations of attorney negligence and a failure to communicate are enough to state a claim of "extraordinary circumstances" and to warrant an evidentiary hearing on that claim.

In ordering that respondent is entitled to an evidentiary hearing on his equitable tolling claim, the Ninth Circuit made three significant legal errors. First, the court, relying on its own earlier decisions, proceeded on the assumption that equitable tolling applies in federal habeas cases that are governed by AEDPA. That assumption is incorrect. The detailed and express tolling provisions in section 2244(d) indicate that equitable tolling should not apply. Assuming that equitable tolling can apply, the Ninth Circuit also erred in accepting that mere attorney negligence and a failure to communicate can amount to an extraordinary circumstance that would warrant equitable tolling. That decision conflicts with the decisions of most other courts of appeals, which also are in analytical conflict with each other.

In addition, the Ninth Circuit mistakenly held that respondent is entitled to an evidentiary hearing on equitable tolling even though the court could not tell from respondent's plead-

ings and submissions whether the attorney's failure to communicate had any effect on respondent's ability to pursue his claims. Respondent failed to plead any causal relationship between the attorney's alleged failure to communicate and respondent's inability to file a timely petition, yet the court ordered that he is entitled to an evidentiary hearing. Such a lax pleading requirement, that rewards an insufficient pleading with a hearing, would entitle almost any habeas petitioner to an evidentiary hearing on equitable tolling. That outcome will result in many unnecessary evidentiary hearings, straining judicial resources, and subjecting the States of the circuit to considerable expense.

I. The Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition.

In this case, the Ninth Circuit proceeded on the assumption that equitable tolling applies in the AEDPA context. The court cited its own decisions in which it had determined that equitable tolling applies. (Pet. App. 14-15, citing *Miranda v. Castro,* 292 F.3d 1063 (9th Cir. 2002); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003); and *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001)). The court erred in assuming that equitable tolling is available in cases otherwise governed by the AEDPA one-year statute of limitations and in relying on that assumption when ordering that respondent is entitled to an evidentiary hearing.[4]

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[4] Admittedly, petitioner did not press this claim below. But respondent argued in his brief that equitable tolling was available (Opening Br. 23), and petitioner replied in part by noting that this Court has not decided the issue. (Appellee's Br. 30 n. 7, citing *Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8 (2005)). In any event, it would have been futile to have pressed the claim that equitable tolling is not available. The

This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8 (2005). In *Pace,* the Court merely "assume[d] without deciding its application for purposes of th[at] case." *Id. Cf. Duncan v. Walker,* 533 U.S. 167, 182-84 (2001) (Stevens, J., concurring in part, joined by Souter, J.) (nothing in that case, "nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity").

Concededly, most courts that have considered the issue have ruled that the one-year limitations period in §§ 2244 and 2255 is subject to equitable tolling. *See Williams v. Sims,* 390 F.3d 958, 962 (7th Cir. 2004) (collecting cases). Those decisions, however, have not given sufficient attention to the statutory text of those provisions and to the fact that, in section 2244 in particular, Congress explicitly prescribed the circumstances in which the one-year limitations period can be extended or tolled. Opinions that have reached or have suggested the opposite conclusion – and that have determined that equitable tolling is not or may not be available at all in the AEDPA context – have given more attention to the statutory text. *See Solomon v. United States*, 467 F.3d 928, 936 (6th

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Ninth Circuit repeatedly has embraced the concept of equitable tolling in the AEDPA setting, including in an en banc decision. *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir.), *cert. denied* 522 U.S. 1099 (1988), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied* 526 U.S. 1060 (1999). The State recently filed a petition for certiorari in another federal habeas case which also raises the issue of whether equitable tolling is available in the AEDPA context. *Belleque v. Kephart* (No. 06A573).

Cir. 2006) (Griffin, J., dissenting) (emphasizing the paramount significance of the statutory text, and indicating that the detailed and specific text of section 2255 does not suggest any Congressional intent to allow for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (given the express tolling provisions of 28 U.S.C. § 2244(d), "it is unclear what room remains for importing the judge-made doctrine of equitable tolling"); *David v. Hall,* 318 F.3d 343, 346 (1st Cir.), *cert. denied* 540 U.S. 815 (2003) (noting that section 2244(d) defines the one-year limitations period "in detail" and that it "adopt[s] very specific exceptions;" "Congress likely did not conceive that the court would add new exceptions and it is even more doubtful that it would have approved of such an effort;" "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up;" but assuming *arguendo* that equitable tolling can be available) (citations omitted); *United States v. Pollard*, 161 F. Supp. 2d 1, 12 (D DC 2001) ("The intent of Congress to prevent equitable tolling is indicated by the specific provisions in § 2255 to control the statute of limitations"); *Giles v. United States*, 6 F. Supp. 2d 648, 650 (ED Mich 1998) ("The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute") (citation omitted). This Court should grant certiorari to resolve the conflicting views about whether equitable tolling is available under the AEDPA to excuse the otherwise untimely filing of habeas petitions. That issue is extremely important to States, to habeas petitioners, and to the lower federal courts.

This Court also should review this issue because the decision of the Ninth Circuit (and of the other courts that have held that equitable tolling is available in this context) appear

to be in tension with recent decisions of this Court holding that equitable tolling is not available when Congress has crafted a plain, specific, and detailed statute of limitations. In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court unanimously rejected the invitation to rewrite "for nonstatutory equitable reasons" a statute of limitations enacted by Congress for the filing of tax returns. The Court held that the statute's detail and its "explicit listing of exceptions" indicated that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp,* 519 U.S. at 352. Similarly, a year later in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), this Court reiterated that "[e]quitable tolling is not permissible when it is inconsistent with the text of the relevant statute." That teaching appears to have been largely forgotten when the issue has been whether equitable tolling is consistent with the text of the AEDPA. *But see Solomon,* 467 F.3d at 937-39 (Griffin, J., dissenting, relying on the Court's decisions in *Brockamp* and *Beggerly* to conclude that equitable tolling should not be available under section 2255).

II. The Ninth Circuit derived an extraordinary circumstance from mere attorney negligence; its decision conflicts with that of other circuits.

Based on the assumption that equitable tolling is available in cases governed by the AEDPA's statute of limitations, this Court has held that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. "*Pace v. DiGuglielmo*, 544 U.S. at 418, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The focus in this case is on the existence of extraordinary circumstances. At least for present purposes, the State accepts that respondent has adequately alleged that he attempted to contact his post-

conviction appellate attorney (although, as discussed below, he has not adequately alleged any causal relationship between his attorney's negligence and his inability to file a timely habeas petition).

In this case, the Ninth Circuit held that a state post-conviction attorney's failure to keep his client apprised of the progress of a post-conviction appeal could amount to an "extraordinary circumstance" warranting equitable tolling of the AEDPA statute of limitations. Although the court professed adherence to the rule that "[t]he mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling" (Pet. App. 14), the court appears to have accepted that mere attorney negligence can be an "extraordinary circumstance." Respondent's claim is simply that his attorney failed to keep him informed about what was happening with his post-conviction appeal, despite respondent's efforts to contact the attorney. Because of that failure, respondent alleges that he did not know that the Oregon Court of Appeals had decided his case and that a petition for review was due. That is a claim of negligence only.

Other courts of appeals have refused to accept similar claims of attorney negligence. Their decisions conflict with the Ninth Circuit's decision in this case and, at least in some respects, the decisions also conflict with each other. The First, Third, Fourth, Fifth, and Eleventh Circuits have held that attorney negligence, such as the failure to notify a client of the denial of state post-conviction or misadvice about the AEDPA statute of limitations, is not an extraordinary circumstance that warrants equitable tolling. In *LaCava v. Kyler*, 398 F.3d 271 (3rd Cir. 2005), in seeking equitable tolling the petitioner relied on the fact that his attorney had not informed him that the state supreme court had denied his post-conviction petition. The Third Circuit rejected the claim. "[A]ttorney error, miscalculation, inadequate research, or other mistakes have

not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *LaCava*, 398 F.3d at 276 (internal quotation marks and citations omitted).[5]

In *Rouse v. Lee,* 339 F.3d 238, 248 (4th Cir. 2003) (en banc), *cert. denied* 541 U.S. 905 (2004), the court held that an attorney's misinterpretation of law is not a basis for equitable tolling.

> This circuit has held that "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond a party's control where equity should step in to give the party the benefit of his erroneous understanding." *Harris*[*v. Hutchison*], 209 F.3d [325,] at 331 [(4th Cir. 2000)]. A majority of other circuits agree. *See Merritt v. Blaine*, 326 F.3d 157, 169 (3rd Cir. 2003) (applying general rule that "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling") (internal quotation marks omitted [in *Rouse*]); *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assis-

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[5] Citing its own earlier decision in *Seitzinger v. Reading Hosp. & Med. Ctr.,* 165 F.3d 236 (3rd Cir. 1999), the court suggested that an attorney's affirmative misrepresentation might be a different matter. *LaCava*, 398 F.3d at 276. In *Seitzinger*, the court had held that "an attorney's affirmative misrepresentation to his client that he had filed a timely complaint on her behalf when in fact he had not, coupled with the plaintiff's extreme diligence in pursuing her claim, 'created a situation appropriate for tolling.'" *Id.*

> tance of counsel generally does not warrant equitable tolling."); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) ("Counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period."); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2nd Cir. 2001) ("Attorney error [is] inadequate to create the 'extraordinary' circumstances equitable tolling requires."); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (holding that a lawyer's miscalculation of the limitation period was not a valid basis for equitable tolling); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (refusing to apply equitable tolling where late filing was caused by attorney's use of ordinary mail to send petition less than a week before it was due); *Gilbert by Gilbert v. Sec. of Health & Human Servs.*, 51 F.3d 254, 257 (Fed. Cir. 1995) ("The negligence of Gilbert's attorney does not justify equitable tolling").

Rouse, 339 F.3d at 248-49 (footnote omitted). *See also Harris v. Hutchison*, 209 F.3d 325, 331 (4th Cir. 2000) (attorney's mistake in interpreting statute of limitations is not an extraordinary circumstance).

Other cases from other circuits are similar. *See Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005) (attorney's errors in

calculating time limits or advising petitioner of the filing deadlines do not constitute extraordinary circumstances); *Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002), *cert. denied* 539 U.S. 918 (2003) (attorney's failure to check status of case does not warrant equitable tolling); *Helton v. Sec'y for Dept. of Corrections*, 233 F.3d 1323 (11th Cir. 2000) (attorney miscalculation of limitations period or mistake is not a basis for equitable tolling).

The Seventh Circuit has taken a more extreme approach. Under that circuit's case law even complete attorney incapacity or directly misleading advice cannot amount to an extraordinary circumstance justifying equitable tolling. *Modrowski v. Mate*, 322 F.3d 965, 966 (7th Cir.), *cert. denied* 540 U.S. 925 (2003) (attorney incapacity "is analogous to an attorney's failure to act as a result of negligence, for which we do not permit equitable tolling"); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("Even before *Pace*, this court had rejected applying equitable tolling to circumstances where counsel directly misled a client that he filed a timely petition") (citation omitted).

Other courts and decisions distinguish between attorney negligence and affirmative misrepresentations, finding the former not enough to warrant equitable tolling, while the latter may suffice. *See Brown v. Shannon*, 322 F.3d 768, 774 (3rd Cir.), *cert. denied* 539 U.S. 948 (2003) (contrasting negligence with a situation where an attorney "affirmatively lied" to his client when he said that he had filed a complaint on her behalf); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (attorney's affirmative misrepresentations can be grounds for equitable tolling); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 241 (3rd Cir. 1999) (same, because affirmative misrepresentations go "beyond garden variety neglect"). *See also Schlueter v. Varner*, 384 F.3d 69, 76 (3rd Cir. 2004), *cert. denied* 544 U.S. 1037 (2005) (distinguishing be-

tween attorney misrepresentation as to what he will do, which is not enough for equitable tolling, and misrepresentation as to what he has done, which might be sufficient). However, in *Modrowski,* 322 F.3d at 968, the Seventh Circuit expressly disagreed with the distinction between attorney negligence and affirmative misrepresentation, noting that court has held that "attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client." (Citations omitted).

Still other courts and decisions appear to apply an analyses that approximates the one employed by the Ninth Circuit in this case. *See United States v. Martin*, 408 F.3d 1089, 1094-95 (8th Cir. 2005) (misleading client and failure to communicate can amount to extraordinary circumstance); *Baldayaque v. United States,* 338 F.3d 145 (2nd Cir. 2003) (attorney misadvice and failure to communicate with client may provide basis for equitable tolling).

In sum, the Ninth Circuit's decision in this case conflicts with the vast majority of decisions from the federal courts of appeals that have held that attorney negligence, erroneous advice, and a failure to communicate are not extraordinary circumstances that can justify equitable tolling. Beyond that, the courts of appeals apply differing analyses to equitable tolling claims based on attorney error, with some courts (and some decisions) rejecting such claims categorically, while others draw a distinction between attorney negligence and affirmative misrepresentation or even between misrepresentation about what will be done as opposed to what has been done. The case law in this area appears to be in disarray and, in an area where reasonable predictability is important both to habeas petitioners and the States, the results seem conflicting and almost random. This Court should issue the writ to consider when, if ever, attorney negligence, misconduct, misad-

vice, and failure to communicate with a client can amount to an extraordinary circumstance justifying equitable tolling.

III. The Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

The State has recently filed a petition seeking the issuance of a writ of certiorari in a Ninth Circuit case in which that court ordered that a federal habeas petitioner was entitled to an evidentiary hearing on equitable tolling based on merely conclusory allegations that he was diligent because he used the prison law library occasionally and knew what was in it. *Belleque v. Kephart* (No. 06A573). Those scant allegations, the Ninth Circuit held, were a sufficient showing of diligence to entitle the petitioner to an evidentiary hearing on his equitable tolling claim. *Roy v. Lampert*, 455 F.3d 945, *amended* 465 F.3d 964, 971 (9th Cir. 2006). In its petition in that case, the State argued that if those allegations of diligence are enough to warrant an evidentiary hearing, then virtually any prisoner who advanced an equitable tolling claim and made the most minimal showing would be entitled to an evidentiary hearing. Such a result, the State argued, would waste district court time and subject the States in the circuit to many unnecessary evidentiary hearings.

The State also pointed out that the Ninth Circuit's approach is contrary to that adopted by other circuits. The Eleventh Circuit has held that an evidentiary hearing need not be held on a claim of equitable tolling "'when [a habeas petitioner's] claims are merely conclusory allegations unsupported by specifics.'" *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), quoting *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1293 n. 7 (11th Cir. 2002), *cert. denied* 537 U.S. 1237 (2003), in turn quoting *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* 502 U.S. 1105 (1992). *See also Drew*, 297 F.3d at 1293 ("In light of the wholly conclusory nature of

Drew's recently-presented allegations and in the absence of supporting evidence, the district court did not abuse its discretion in deciding not to hold a hearing"). Similarly, the Seventh Circuit has stated that an evidentiary hearing is not required "when a petitioner's allegations are 'vague, conclusory, or palpably incredible, rather than detailed and specific.'" *Kato v. United States*, 467 F.3d 1063, 2006 U.S. App. LEXIS 27262, **8 (7th Cir. 2006), quoting *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001) (internal citations and internal quotation marks omitted in *Kato*).[6]

The Ninth Circuit's approach in *Roy v. Lampert* and in this case stands in stark contrast to the approach of the Eleventh and Seventh Circuits. In *Roy* the court ordered an evidentiary hearing on a claim of equitable tolling based on the most conclusory of allegations of diligence. Such conclusory allegations would not suffice in the Eleventh or Seventh Circuits.

In addition to the direct conflict with the Eleventh and Seventh Circuits, the Ninth Circuit's ready willingness to order an evidentiary hearing based on mere conclusory allegations conflicts with the case law of other circuits as well. In *LaCava v. Kyler*, 398 F.3d at 277, the Third Circuit indicated

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[6] In addition to disagreeing about the standard that applies when deciding whether to grant an evidentiary hearing, the courts of appeals disagree about the standard of review that applies to such a decision. *See, e.g., Rouse*, 339 F.3d at 247 & n. 7-9 ("The other circuits are divided on the proper standard of review, with some applying abuse of discretion and others applying de novo review. Several circuits provide for de novo review in certain circumstances, and abuse of discretion review in all other circumstances") (footnotes omitted). In this case, it is not clear what standard of review the Ninth Circuit applied.

that an evidentiary hearing concerning equitable tolling is not warranted if the petitioner fails to show that he exercised reasonable diligence in attempting to file a timely petition. *See also Robinson v. Johnson,* 313 F.3d 128, 142 (3rd Cir. 2002), *cert. denied* 540 U.S. 826 (2003) (evidentiary hearing need not be held in every case where the petitioner claims he was deprived of access to his legal materials; no hearing required when the deprivation was relatively brief, petitioner said he needed the materials for state court filings, and ultimately he filed federal habeas without them).

In this case, the Ninth Circuit compounded the error it made in *Roy v. Lampert,* and took an approach that is inconsistent with and even less demanding than that taken by the court in *Roy.* At least in *Roy* the court stated at one point that the rule was that a habeas petitioner "should receive an evidentiary hearing when he makes a good-faith *allegation that would, if true*, entitle him to equitable tolling.'" *Roy,* 465 F.3d at 969, quoting *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir 1998) (en banc) (emphasis in *Roy*). In this case, however, according to the court respondent was entitled to an evidentiary hearing because the court could not tell whether the lack of communication from respondent's post-conviction counsel "hindered [respondent] from proceeding with his state application." (Pet. App. 15). It was "unclear to what extent, *if any*," respondent had been hindered by his attorney's alleged failure to communicate. (Pet. App. 15) (emphasis added).

To order an evidentiary hearing on equitable tolling -- when it is unclear whether the claimed hindrance had *any* effect on the habeas petitioner's ability to pursue his rights, and when it thus is unclear whether there is any causal relationship between the claimed hindrance and the failure to file

timely -- is to reward poor pleading and to force upon the district court and the State an evidentiary hearing based on wholly insufficient allegations. Viewing this case and *Roy* together, it is apparent that the Ninth Circuit is applying inconsistent and insufficiently demanding standards when determining whether to order evidentiary hearings on equitable tolling. The Ninth Circuit has set the bar that must be cleared to obtain an evidentiary hearing much too low. Its approach to the issue conflicts with that employed by other circuits, which demand more from a habeas petitioner. The Ninth Circuit's approach will waste considerable trial court time and consume scare judicial resources. It will force the States of the circuit into unnecessary evidentiary hearings in many cases. The availability of an evidentiary hearing on equitable tolling should not vary widely from circuit to circuit. To ensure some uniformity of federal practice, this Court's intervention and guidance is needed.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below

Respectfully submitted,

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